

# **The New French Class Action Law: How Does it Compare to the Established U.S. Class Action Law?**

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On March 17, 2014, the French National Assembly enacted Loi Hamon, n°2014-344,<sup>3</sup> providing French consumers with the remedy of a class action. France is the latest European nation to enact a law that provides its citizens with the option to collectively seek redress from harm.<sup>4</sup> The French law may have been inspired by the representation of the American class action law in the movie *Erin Brockovich*,<sup>5</sup> but it has not completely copied its American counterpart, Federal Rule of Civil Procedure Rule 23 ("FRCP Rule 23").

## **I. SIMILARITIES IN THE FRENCH AND U.S. CLASS ACTION LAWS**

The American inspiration for the French class action is evident in several provisions of the law. While the laws are in no way identical, both contain provisions that require a clear definition of the class, clear terms for recovery by the class, and that any settlement with the class be approved at the discretion of the court with jurisdiction over the class.

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<sup>3</sup> Law Nos. 423-1 to 26. of March 17, 2014.

<http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069565&dateTexte=20140428>. (Last Accessed April 28, 2014.)

<sup>4</sup> "Class Action, France Finally Catching Its Neighbors." <http://fr.myeurop.info/2014/02/13/class-action-la-france-ratrappe-europe-consommation-13150>. (Last Accessed April 28, 2014).

<sup>5</sup> "Towards 'Class Actions' in French." <http://www.franceculture.fr/2013-12-17-vers-des-class-actions-a-la-francaise> (Last Accessed April 28, 2014).

<b>Similar Provisions in the American and French Law<sup>67</sup></b>	
<b>United States' Provisions</b>	<b>French Provisions</b>
<p><b>Basis to Bring Action</b></p> <p><b>(a) Prerequisites.</b> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:</p> <p>(1) the class is so numerous that joinder of all members is impracticable;</p> <p>(2) <b>there are questions of law or fact common to the class;</b></p> <p>(3) <b>the claims or defenses of the representative parties are typical of the claims or defenses of the class;</b> and</p> <p>(4) the representative parties will fairly and adequately protect the interests of the class.</p> <p><b>(b) Types of Class Actions.</b> A class action may be maintained if Rule 23(a) is satisfied and if:</p> <p>(1) prosecuting separate actions by or against individual class members would create a risk of:</p> <p>(A) inconsistent or varying adjudications with respect to individual class members [...]</p> <p>(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications [;]</p> <p>(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class [...]</p> <p>(3) <b>the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members,</b> and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.</p>	<p><b>Basis to Bring Action:</b></p> <p><b>Section 1: Scope of the group action and standing</b></p> <p>An association for the defense of representation of national consumers and approved under <a href="#">Article L. 411-1</a> may act in a civil court to obtain compensation for the damages suffered by individual consumers placed in a similar or identical situation and having common cause of action for failure of professional legal or contractual obligations: 1 On the occasion of the sale of goods or provision of services; 2 Or when these injuries result from anti-competitive practices within the meaning Title II of Book IV of the Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union. Group action can only relate to compensation for pecuniary damage resulting from damage suffered by consumers .</p>
<p><b>Class Certification</b></p> <p>(3) <i>Judgment.</i> Whether or not favorable to the class, the judgment in a class action must:</p> <p>(A) for any class certified under Rule 23(b)(1) or (b)(2), <b>include and describe those whom the court finds to be class members;</b> and</p> <p>(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, <b>and whom the court finds to be class members.</b></p>	<p><b>Class Certification</b></p> <p><b>Section 2: Judgment on Liability</b></p> <p>In the same decision, the court finds that the conditions of admissibility laid down in Article L. 423-1 are met and rules on professional responsibility, <b>in view of individual cases presented by the applicant association. It defines the group of consumers for whom the defendant's liability is engaged and fixes points of attachment. The judge determines the damage could be repaired for every consumer or each category of consumers constituting the group and their amount or all elements for the assessment of these damages.</b> When the injury is of such a nature that it is more appropriate for the defendant to repair the injury, the judge specifies the conditions for the implementation of the repair by the professional. At any stage of the proceedings, the judge may make any order or necessary instruction legally permissible to the preservation of evidence and production of documents, including those held by the professional.</p>
<p><b>Alternative Dispute Resolution Provision</b></p> <p><b>(e) Settlement, Voluntary Dismissal, or Compromise.</b> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:</p> <p>(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.</p> <p>(2) <b>If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.</b></p> <p>(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.</p> <p>(4) If the class action was previously certified under Rule 23(b)(3), <b>the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.</b></p> <p>(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.</p>	<p><b>Alternative Dispute Resolution Provision</b></p> <p><b>Section 5: Mediation</b></p> <p>Article L423-15</p> <p>Only the applicant association can participate in mediation under the conditions laid down in Chapter I of Title II of Law No. 95-125 of 8 February 1995 on the organization of courts and civil, criminal and administrative proceedings, to obtain compensation for individual losses mentioned in Article L. 423-1.</p> <p>Article L423-16</p> <p><b>Any agreement negotiated on behalf of the Group is subject to the approval of a judge, which checks if it conforms to the interests of those it is intended to apply and gives it binding.</b> This agreement specifies the necessary publicity to inform consumers concerned about the possibility of acceding to, as well as the time and manner of accession.</p>

<sup>6</sup> Translation of the French law could differ in an official translation.

<sup>7</sup> Bold not in original.

### A. CLEAR DEFINITION OF THE CLASS

In the United States a class action is proper when: "(1) the class is so numerous that joinder is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) The representative parties will fairly and adequately protect the interests of the class."<sup>8</sup> In order for a putative class action to be certified in the U.S., the class must fit the following five criteria, defined above: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy, and (5) superiority—a class action is the most efficient and appropriate method to resolve the dispute.<sup>9</sup> If the putative class does not meet the abovementioned criteria, then the action will not be able to proceed as a class action.

Similarly, the French law requires that the class members have been (1) injured by a similar or identical situation (2) involving the same cause of action stemming from legal or contractual obligations.<sup>10</sup>

Both laws require the putative class members to have a common cause of action that stems from the same, or similar set of facts, and that the injury to class members be of the same type.

### B. CLASS DEFINED BY COURT

The U.S. class action law requires that the judgment "include and describe those whom the court finds to be class members..."<sup>11</sup> The court must clearly define who has been injured and who may receive a benefit from the judgment of the class action.

Also, the Loi Hamon requires the court clearly define who has been injured and who may be part of the judgment.<sup>12</sup>

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<sup>8</sup> FRCP R. 23

<sup>9</sup> FRCP R. 23(b)

<sup>10</sup> L423-1

<sup>11</sup> FRCP R. 23(c)(2)(3)(A)-(B)

### C. DISCRETION TO APPROVE SETTLEMENT

In order to more efficiently resolve a class action, the French and the American laws allow the parties to resolve the matter outside of the courts.<sup>13</sup> If parties are able to mediate or settle the matter outside of the courthouse, the court may then, at its discretion, approve the settlement. The law in both countries is designed to enable individuals with little means to go against large entities with expansive resources. In the spirit of both laws, the courts must ensure that the class has been able to fairly negotiate a settlement, and the settlement is in the interest of justice,<sup>14</sup> before it decides to enforce the settlement.

## II. MAJOR DIFFERENCES IN THE FRENCH AND AMERICAN CLASS ACTION LAWS

Even though the French law may be modeled after the U.S. class action law, there are clear distinctions between the two laws.

### A. TYPES OF ACTIONS AND REPRESENTATION

In the U.S. a class action is not limited by subject matter. If a class meets the requirements of FRCP R 23, the class can be made up of persons who have been injured as a result of environmental pollutants or antitrust violations or anything else that has caused an injury. As long as the class can be defined within the parameters of the five previously mentioned criteria, then the action is proper.<sup>15</sup>

The French law, in contrast, limits the types of class actions that may be brought by subject matter. The French law limits the class action as a remedy for harms that stem from the sale of goods or services or as a result of an anti-trust violation.<sup>16</sup> The law is so much more limited than the American class action law. The American movie that served as an inspiration

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<sup>12</sup> L423-3

<sup>13</sup> FRCP R 23(e). *See Also*, L423-15 and L423-16.

<sup>14</sup> *Id.*

<sup>15</sup> FRCP 23

<sup>16</sup> L423-1

for the French group action, *Erin Brockovich*,<sup>17</sup> is based on a case involving health and environmental injuries,<sup>18</sup> would not have been allowed to go forward as a group action in France.

The subject matter is further limited in France by the representation available to the class. French putative class members cannot hire an attorney for class representation, but must be represented by one of the 16 approved consumer associations.<sup>19 20</sup> A putative class injured by environmental or health hazards is unable to bring an action, because those groups are not part of the 16 approved associations.<sup>21</sup>

The U.S. has no representation limitation. Individuals can bring an action individually on behalf of a class, or through their attorney.<sup>22</sup> Attorneys and individuals are incentivized to bring class actions because FRCP R 23 contains a provision that enables an award of attorney fees at the discretion of the presiding judge.<sup>23</sup> The measurement of fee awards can be based on the lodestar, which is the amount of time worked on a case, or other reasonable basis to arrive at the fee award. Without the possible award of attorney's fees, it would not be economically feasible for large groups of people who have suffered damages, that are less than an attorney's hourly rate, to bring an action. The possibility of the award of attorney's fees, therefore, encourages attorneys to represent parties that would otherwise never get their day in court.

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<sup>17</sup> [http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe\\_1437886.html](http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe_1437886.html).

<sup>18</sup> *Anderson v. Pac. Gas & Elec. Co.*, 14 Cal. App. 4th 254, 17 Cal. Rptr. 2d 534 (Cal. 1st Dist. Ct. App. 1993).

<sup>19</sup> [http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe\\_1437886.html](http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe_1437886.html)

<sup>20</sup> Attorneys may serve an advisory role in the action. See L423-9

<sup>21</sup> [http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe\\_1437886.html](http://lexpansion.lexpress.fr/actualite-economique/ce-que-change-la-loi-sur-la-consommation-en-plus-de-l-action-de-groupe_1437886.html)

<sup>22</sup> FRCP 23(g) defines who can serve as a class counsel, which is not a subject limitation but a limitation that ensures that the class is adequately represented in the class action.

<sup>23</sup> FRCP(h)

The French law, has no contingency provision for compensation of attorneys. The law limits the role attorneys to advisors. There is no provision in the French law for awarding attorney's fees.<sup>24</sup>

#### B. OPTING-IN VERSUS OPTING-OUT

In the U.S., under FRCP Rule 23, class members are generally<sup>25</sup> presumed to accede to the class action, unless the class member, or members, request to be excluded.<sup>26</sup> Once the class is certified, and the class has been noticed, it is the class member's responsibility, as individuals, to request to be excluded from the class and "opt-out."

France's class action law does not assume that class members accede to the action, but that the putative members will choose to be part of the class action, "opting-in."<sup>27</sup> The French law states that once the judge finds the claim against defendant plausible the defendant must publish this decision<sup>28</sup> in order for putative class members to be informed of a possible claim and decide whether or not they want to opt-in. Class members then have a time frame, between 2 and 6 months as set by the court,<sup>29</sup> to notify the class representative group and their decision to "opt-in."<sup>30</sup> Group members must notify the representative of their decision to opt-in in order to benefit from any recovery or award.<sup>31</sup>

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<sup>24</sup> L423-9.

<sup>25</sup> Certain group actions in the U.S. are "opt-in" cases. For example, plaintiffs who bring a group action under the Fair Labor Standards Act, the law that enables employees to obtain wages they are owed by their employer states: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 USCS § 216.

<sup>26</sup> 23 (c)(2)(B)(v) & (vi)

<sup>27</sup> L423-4

<sup>28</sup> L423-4

<sup>29</sup> L423-5

<sup>30</sup> L423-7

<sup>31</sup> Id.

### C. AWARDS AVAILABLE

The French group action award is limited to pecuniary or restorative damages.<sup>32</sup> The French law aims to repair the injury to the consumer, placing the consumer in the same position he would be in if he had not been injured.<sup>33</sup> The American law, in contrast, allows the consumer to be awarded an amount that would place them in a better position than they would have been in without the injury. The American law provides for treble damages, in certain cases,<sup>34</sup> to act as a deterrent, unlike the French law which has the goal of being a restorative remedy for consumers.<sup>35</sup>

### III. PROVISIONS UNIQUE TO FRANCE'S GROUP ACTION LAW

In order to serve the unique interests of the French consumer, the French group action law contains provisions that are not comparable to the American class action law.

#### A. SPECIAL PROCEEDING

The French law provides a special procedure to accelerate the class action process. When the class of consumers is easily identifiable as a specific number, the court can hasten the process of determining defendant's liability and order defendant to compensate each aggrieved consumer.<sup>36</sup> Because the number and identities of class members is known before the class action is brought, the option to opt-in is closed *de facto*. This provision allows the decision to remain out of the public by contacting each individual and quickly remedying their injury.

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<sup>32</sup> L423-1 and L423-3.

<sup>33</sup> *Id.*

<sup>34</sup>For example, in anti-trust actions, the U.S. Supreme Court has opined: "Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to "[any] person who shall be injured in his business or property *by reason of anything* forbideen[sic] in the antitrust laws," 15 U. S. C. § 15 (emphasis added). [Congress] sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

<sup>35</sup> "That the Hamon Consumer Law Will Change." <http://www.challenges.fr/economie/20140228.CHA1032/ce-que-la-loi-hamon-sur-la-consommation-va-changer.html>. (Last Accessed April 28, 2014).

<sup>36</sup> L423-10

### B. REPLACEMENT OF REPRESENTATIVE GROUP

If the consumer group representing a class is not providing adequate representation to the class, then one of the other 15 consumer groups not involved in the matter may ask the court to substitute.<sup>37</sup>

### C. CONTRACTS CANNOT PROHIBIT PARTICIPATION

The French law does not allow any contract to circumvent the law by including provisions prohibiting the remedy of participation in a group action.<sup>38</sup> The law voids any group action prohibition in a contract. This unique article follows the spirit of the law, and allows those who do not have the ability to negotiate at arms length an additional remedy if the party with the upper hand breaches the contract.<sup>39</sup>

## IV. CONCLUSION

French citizens are the latest European nation to enact a group action law inspired by the American class action law. The law mirrors the American law with provisions that aim to ensure the class is clearly identified and that any settlement is fair, but the French law is clearly contrasted with its more broad American counterpart. The French law is not all encompassing as the American law, but instead has a narrow pecuniary purpose.

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<sup>37</sup> 423-23

<sup>38</sup> L423-25

<sup>39</sup>The U.S. law does not have an explicit provision in the statute addressing contracts and class actions, but the United States Supreme Court addressed this issue in *AT&T Mobility LLC v. Concepcion*. "[Vincent] and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T). The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) (Footnotes and citations omitted). The U.S. Supreme Court upheld the contract provision that required resolution of disputes by individual arbitration, and denied the remedy of "any purported class or representative proceeding." *Id.*